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Supreme Court of the United States

OCTOBER TERM 1946

No. 435

ANNA C. DICKHEISER and EDWARD S. BIRN, on their own behalf and on behalf of all other stockholders of THE PENNSYLVANIA RAILROAD COMPANY, one of the defendants herein,

Petitioners,

against

THE PENNSYLVANIA RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania; M. W. CLEMENT, C. JARED INGERSOLL, ARTHUR C. DORRANCE, THOMAS S. GATES, RICHARD K. MELLON, LEONARD T. BEALE, PIERRE S. DUPONT, D. R. MCLENNAN, FRANKLIN D'OLIER, ROBERT T. MCCRACKEN, THOMAS NEWHALL, JAMES E. GOWEN, RICHARD D. WOOD, J. F. DEASY, WALTER S. FRANKLIN, J. R. DOWNES, GEORGE H. PABST, JR., THE PENNROAD CORPORATION, IONE M. OVERFIELD, GRACE STEIN WEIGLE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

ARCHIBALD PALMER,
Counsel for Petitioners.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show to the Court as follows:

This is a petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals

for the Third Circuit, entered in the above cause on the 27th day of May, 1946, affirming a final decree of the District Court of the United States for the Eastern District of Pennsylvania, which granted the motion of the defendant-directors for a summary judgment under Rule 56 and dismissing the action as to the defendant Pennroad Corporation for failure to state a claim upon which relief could be granted.

Opinions Below

The opinion of the District Court of the United States for the Eastern District of Pennsylvania is reported in 5 F. R. D. 5 (E. D. Pa. 1945).

The Circuit Court of Appeals wrote no opinion.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1945.

Statement of Facts

A stockholders' suit seeking restitution for the wrongdoings of the Pennsylvania Railroad Company and the Board of Directors of the Pennroad Corporation, as well as its former directors, was filed in Delaware in October, 1932 by Julia A. Perrine and her brother, Joseph W. Perrine. That case never proceeded to trial for the chief reason that the individual defendants named herein were non-residents of the State of Delaware and at all times evaded service of process. In 1936 Daniel W. Hastings became counsel for the complainants, Julia A. Perrine and Joseph W. Perrine. In 1938, the United States Senate Committee, including among its members the present President of the United States, investigated the relationship of the Pennsylvania

Railroad Company and the Pennroad Corporation and for the first time spread upon the record and exposed to public gaze the history of Pennsylvania's manipulations of Pennroad.

As a result of the formation of a stockholders' committee Mr. Kenneth Guiterman, on behalf of Ione M. Overfield, in August 1939, commenced a stockholders' derivative suit against the defendants in the District Court of the United States for the Eastern District of Pennsylvania. To this suit there was joined another complaint, filed by Grace S. Weigle by her counsel, Daniel W. Hastings, in the same court, against the same defendants. Together these suits included all of the wrongful transactions which originally formed the basis of the suit in the Perrine case. Weigle's bill complained of eight purchases made by the Pennroad Corporation and consummated by it pursuant to a scheme to employ its funds for the benefit of the Pennsylvania Railroad Company, to the damage of Pennroad. Overfield's complaint, prior to amendment, complained of only one of the transactions set forth in Weigle's bill, that grew out of the freight forwarding project. The Weigle suit was filed on June 7, 1937; the Overfield on March 30, 1939. Jurisdiction in both suits was based upon diversity of citizenship. On February 10, 1941, the District Court made an order consolidating both cases and proceeded to trial. Four days later Overfield asked leave to intervene as a party plaintiff in the Weigle suit, submitting with her motion a petition asserting that she adopted the eight causes of action set out by Weigle. The District Court allowed the intervention. The trial consumed seventy-eight trial days. The record was of unusual length. The appendix was in excess of ten thousand pages. Many of the pertinent facts will be found in the opinion of the District Court reported at 42 Fed. Supp. 586 and 48 Fed. Supp. 1008. On January 19, 1943, the District Court Judge rendered a judgment in favor of the complainants in the sum of $22,104,515.92. On appeal the Circuit Court of Appeals reversed the lower court judg-

ment in a decision rendered on December 28, 1944 (146 Fed. [2d] 889). The time for filing petitions for rehearing with the Circuit Court of Appeals was extended from time to time, upon application of counsel for the plaintiffs in the Overfield and Weigle suits, the most recent extension was to June 15, 1946.

Shortly after the decision of the Circuit Court of Appeals was announced in the Overfield and Weigle suits initial steps were taken by counsel for the plaintiff in the Perrine suit for an early trial of their suit. Negotiations were suddenly instituted between emissaries of both Pennroad and Pennsylvania Railroad in January and February of 1945.

It appears that after discussion between the defendant Robert T. McCracken and Charles Thompson, whose law firm represented several estates of former directors of the Pennroad Corporation, Mr. Thompson contacted Mr. Pepper, president of the Pennroad, for the purpose of discussing the possibility of a settlement of the Pennroad litigation. This was about January 17, 1945. Mr. Hastings informed Mr. Pepper that he saw no reason why Mr. Pepper should not confer with Mr. McCracken concerning settlement of the litigation. On Saturday, January 20, 1945, while in New York, Mr. Hastings received a telephone call from Mr. Pepper advising him that on the following Monday he would have an offer of $12,000,000 from the Pennsylvania Railroad Company. On Monday, January 22, 1945, Mr. Hastings stopped at the Pennroad office in Philadelphia and was told by Mr. Goodall that the offer would be received that day; this was confirmed by a telephone call to his office in Wilmington that same afternoon. Thereupon Mr. Hastings kept in touch with his associates, Mr. Marshall, Mr. O'Donnell, and others, and the offer was discussed by them all of the next day, Tuesday, January 23, 1945.

At this time, the group decided that the offer of $12,000,000 was not acceptable. The serious reasons for the objection, as stated by Mr. Hastings, were as follows:

"In the first place, it had been conducted by the officers of the Pennroad Corporation, and neither me nor my associates had anything to do with it, and a matter of a little personal pride or jealousy, or what not, caused us to believe that we ought to be in that conference before any decision was reached. I couldn't answer the questions that my associates put to me with respect to it, because I had not been in the conference which negotiated the question. So we reached the conclusion that we would not agree to twelve million dollars" (202).

It appears that when Mr. Hastings had conferred with Mr. Goodall in Philadelphia, on Monday, January 22, 1945, it was suggested by Mr. Goodall that the matter be put up to the board of directors. Mr. Hastings agreed with the suggestion and Mr. Goodall asked him to be present to meet with the board on Thursday, January 25, 1945. At the meeting of the board, Mr. Goodall enlightened the board as to what had taken place and Mr. Pepper explained the negotiations. Mr. Hastings objected to the position that the board had assumed in this matter of settlement and pointed out that the responsibility devolved upon counsel to bring about any settlement "agreement". Just what part had been played up to this point by Mr. Wolf in the settlement negotiation was not explained by Mr. Hastings in his testimony before the Chancellor, but it appears that Pepper had taken up the propriety of his conference with Mr. McCracken of Pennsylvania with Mr. Wolf as well as Mr. Hastings. At the board meeting, Mr. Hastings suggested that the emissaries of Pennroad get in touch with Mr. McCracken and request him to contact counsel for Pennroad and counsel for the stockholders. Within a day or two after the board meeting, Mr. Wolf informed Mr. Hastings that Mr. McCracken desired to confer with the two of them and would also invite Mr. Dickinson of Pennsylvania to be present. At this conference, Mr. Hastings and Mr. Wolf acting on behalf of Pennroad, reached the conclusion that they would be very glad to take 75% of

the judgment which Judge Welsh had given in favor of Pennroad plus interest, amounting to about $18,500,000, and this figure was suggested to the Pennsylvania representatives (206). Soon after this conference, Mr. Wolf and Mr. Hastings made an arrangement to see Judge Welsh for the purpose of discussing the settlement offer. This was done apparently for the reason that Mr. Hastings was under the impression that the Overfield-Weigle case, could be referred back to Judge Welsh for the purpose of passing upon the adequacy of the settlement. This conference with Judge Welsh then was dictated solely because it was believed that Judge Welsh would eventually be the jurist who would be passing upon the adequacy of any settlement which Pennsylvania might offer. As Mr. Hastings himself said:

> "* * * I went to the Judge who knew all about it, who knew about the decisions in the Circuit Court, to inquire of him whether as an officer of his Court he thought that under certain circumstances I ought to recommend the settlement be submitted to him for approval" (209).

At this conference, Mr. Hastings notified Judge Welsh that he did not feel the offer of $12,000,000 was adequate. He then had some conversation with Mr. Pepper who notified him that Mr. Goodall and Mr. Wolf were pursuing the matter with Mr. McCracken and Mr. Dickinson of Pennsylvania. Mr. Pepper told him that Pennsylvania thought any further effort to settle should come from Pennroad and that since the offer of $12,000,000 was unacceptable, Pennroad should state what kind of an offer could be recommended. The settlement negotiations were thereby passed back to Mr. Hastings and his associates (213). Consultation among Mr. Hastings and his associates resulted in a decision to make an offer of 75% of the Welsh judgment without interest or approximately $16,578,000 (214). This offer was made to Mr. McCracken by Mr. Hastings in a letter dated February 12, 1945 (215).

The Pennroad board on February 14, 1945, convened for the purpose of discussing the settlement negotiations and at this time, Mr. Hastings was prevailed upon to reduce the figure to $15,000,000 (219). Once more he consulted Judge Welsh to ascertain whether he thought that if such an offer was made by Pennroad, it should be submitted to him for approval. Once again it is apparent that Mr. Hastings thought that the Overfield-Weigle cases were the subject matter of the settlement and that the Federal Court in Pennsylvania was the proper forum in which to present any settlement "agreement". The board of directors met again the afternoon of February 14th and adopted a resolution approving a $15,000,000 settlement. Mr. Hastings refrained from voting on the motion because he had to consult associates and moreover felt that he had to present the "agreement" to Judge Welsh (222). Thereafter Mr. Hastings and his associates agreed to the settlement of $15,000,000 and he suggested to Mr. Wolf that since Pennsylvania was paying the bill and getting the releases they ought to draw the necessary papers. When Mr. Hastings examined the papers, however, much to his surprise they provided for the settlement of the Perrine suit. As has been previously indicated, it was his thought that the Third Circuit Court of Appeals upon proper petition would be requested to return the Overfield-Weigle case to Judge Welsh for the purpose of having him pass upon the compromise, which, of course, is in accord with the Federal Rules of Civil Procedure. "Cogent reasons" were advanced for this proposed plan but Hastings stated that it would be impossible to get his associates to agree to it unless all parties to the settlement would agree that Judge Welsh should pass upon the matter of fees. Mr. Wolf and Mr. Hastings again conferred with Judge Welsh and asked him to act as an arbitrator in the matter. Judge Welsh agreed to serve in that capacity.

Before any final approval was given by Mr. Hastings to this settlement agreement, however, he not only secured the services of Judge Welsh, acting not as a Federal Judge

but as an individual in the matter of awarding fees, but he also secured a contract from Pennroad providing for the payment of not more than 20%—or $3,000,000—and further providing that all attorneys who so desired could go before Judge Welsh and have the matter of fees determined. The contract which was produced before the Chancellor, also provided that there should be no right of appeal from any award of fees.

It is apparent then that Hastings has played the dominating role in this settlement "agreement" and indeed throughout the course of the entire litigation of the stockholders' claims for the alleged wrongs of Pennsylvania. It was not until Hastings secured the free contract and had obtained the assurance of Judge Welsh that he would act as arbitrator of fees that he finally withdrew his objection to the offer of $15,000,000.

One of the considerations made part of the bargain was the termination of the Overfield-Weigle case, which was still pending for rehearing through a policy of agreed inaction on the part of the Pennsylvania and Pennroad. The settlement agreement was filed in the Chancery Court of the State of Delaware in March of 1945 for the purpose of obtaining the approval from that Court and, also, authorization for carrying into execution the provisions of the contract. Paragraph "3." of the contract reads as follows:

> "That prior to the said payment, the two suits in the Federal Court, above referred to as the Overfield and Weigle cases, shall have been so disposed of that the Mandate of the United States Circuit Court of Appeals for the Third Circuit now directed to be entered shall forthwith go forward to the United States District Court for the Eastern District of Pennsylvania, and the bill dismissed in accordance therewith, but without costs, and the time for applying for certiorari therefrom shall have elapsed."

On or about April 20, 1945, the complaint in the present case was filed. The complaint in substance charges that the agreement of settlement between Pennroad and the

Pennsylvania Railroad is the result of a conspiracy among the defendants, along with counsel for the plaintiffs in the Pennroad suits, to dissipate the assets of the Pennsylvania Railroad to the extent of $15,000,000 and without any reasonable or justifiable basis therefor, and that the approval of the agreement of settlement by the defendant directors of the Railroad Company was in reckless disregard of the interests of the Railroad Company and constituted a breach of their duties as such directors. The essence of plaintiffs' contention in this complaint is that the decision of the Court below in the Overfield-Weigle suits is determinative of the Perrine suit in the Delaware state courts and bars liability in that suit, and that therefore there was no reasonable basis for settlement of the Perrine suit. The complaint seeks to enjoin consummation of the settlement, or, in the alternative, to recover damages from the defendant directors if the agreement should be carried out. The answer of these defendants points out, among other things, that the lower Court's decision in the Overfield-Weigle suits was based solely on the applicable statute of limitations, which is a different statute from that applicable in the Perrine suit in the Delaware courts; that the Perrine suit was begun in 1932, shortly after the time of the transactions complained of and at least seven years before the Overfield-Weigle suits were begun; and that on the basis of these and other factors counsel had advised these defendants that there was no certainty that the Perrine suit could be successfully defended for the Pennsylvania Railroad.

Following the filing of defendants' answer, counsel for petitioners herein, under Rule 26 of the Federal Rules of Civil Procedure, served notice for the taking of depositions of most of the defendant directors and of other persons. As a result of this procedure petitioner's counsel, during five full days of taking depositions, obtained the statements of twelve of the defendant directors of the Railroad Company, these being all the directors of the Railroad Company who were available for that purpose and, with two excep-

tions, all the directors who participated in the approval of the settlement agreement. Petitioners' counsel also obtained the depositions of numerous other persons who were in one way or another involved in or concerned with the settlement agreement and the negotiations leading up to it. All of these depositions were before the District Court, in the form of affidavits in support of a motion by these defendants for summary judgment in their favor. In addition, there were before that Court the affidavits of the two remaining directors of the Railroad Company, Messrs. duPont and Newhall, who participated in the approval of the settlement agreement but were not available for the taking of depositions, reciting in full their participation and their reasons for approving the settlement. The District Court thus had before it the statement of every one of the directors of the Railroad Company, with the exception only of one director, Mr. McLennan, who had died before the settlement in question was proposed, and two other directors, Messrs. Mellon and D'Olier, who, because of participation in the affairs of the United States Government, were absent from the directors' meetings which considered the proposed settlement and in no way participated in the consideration or approval of it.

In addition to thus having before it the statement, under oath, of every director of the Railroad Company who participated in the consideration of the matter at issue, the District Court had before it the statement, under oath, of every other person who had a substantial part in the negotiations leading up to the settlement, including among others the general counsel, the comptroller, the secretary and the treasurer of the Railroad Company, and counsel for the Pennroad Corporation who handled the settlement in its behalf.

The plaintiffs found it necessary to examine other persons who were concerned with the settlement agreement and on account of a motion made by the defendant-directors of Pennsylvania for summary judgment counsel did not proceed with the examination of Mr. Goodall, Chairman of

the Pennroad Board of Directors, Benjamin F. Pepper, President of Pennroad, and John H. Mason, Chairman of the Board of Janney & Company, of New York City, and a director of Pennroad.

In an amendment which the District Court allowed the plaintiffs to make to their complaint, the plaintiffs charged that the defendant directors were derelict in their duty by reason of their failure to seek restitution from the estates of those former directors of the Pennsylvania Railroad who, as directors of the Pennroad, participated in the formation of Pennroad.

Questions Presented

1. Did the defendant directors act in good faith or employ the requisite diligence and prudence, as directors, in approving the settlement agreement and in failing to seek from the estates of the former directors of the Railroad Company who, as directors of Pennroad, participated in its formation, restitution for the amount agreed to be paid to the Pennroad in the settlement agreement?

2. Did the failure to submit the settlement agreement to the District Court for the Eastern District of Pennsylvania for its approval and to follow the procedure prescribed in Rule 23(c) of the Federal Rules of Civil Procedure, constitute a violation of the law and render the agreement invalid?

3. Did the learned Court below err in holding that on the record before the District Court it was proper to apply the summary judgment rule and that the plaintiffs should not have been permitted to take the case to trial?

4. Did the Court below err in holding that the District Court properly dismissed the action brought against Pennroad for failure to state a claim against it upon which relief could be granted?

Specifications of Error to Be Urged

The Court below erred:

1. In holding that there was no basis for the charge that the defendant directors were guilty of fraud or neglect of duty in approving the settlement agreement and in failing to seek restitution from the estates of the former directors;

2. In holding that the defendant directors acted honestly and in good faith, and on reasonable grounds, in approving the settlement agreement with Pennroad, relying on the oral assertions of good faith;

3. In holding that the Railroad Company was not legally entitled to recover from the estates of the deceased Pennroad directors and that the defendant directors were not derelict in their duty in (a) not seeking such recovery; and (b) including in the agreement a release of those estates from Pennroad's claims;

4. In holding that the settlement agreement is not in violation of Rule 23(c) of the Federal Rules of Civil Procedure because not submitted to the Federal District Court for its approval;

5. In holding that the defendant directors' motion for summary judgment could properly be granted on the record before it;

6. In holding that the Pennroad Corporation was not a proper and necessary party to the action and that the bill of complaint failed to state a claim against it under its relief as demanded.

Reasons for Granting of Writ

I

The decisions of the Court below are in substantial conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit.

In *In re Arnstein* v. *Porter,* 154 F. (2d) 464, the Circuit Court for the Second Circuit held that summary judgment based upon depositions is improper and a trial indispensable, notwithstanding that the plaintiff in the matter presented by his affidavits offered nothing to discredit the honesty of the defendant. The Court further held that the rule authorizing summary judgment was not designed to foreclose the plaintiff's privilege of examining the defendant at a trial, especially as to matters peculiarly within the defendant's knowledge. In the case at bar the Circuit Court of Appeals has held in effect, that despite the fact that the credibility of the defendants is crucial and vital, summary judgment based on depositions is proper and a trial could properly be dispensed with, presumably upon the ground that the plaintiffs offered nothing to discredit the honesty of the defendants. In the case at bar the Circuit Court of Appeals for the Third Circuit, in affirming the judgment of the District Court, held, in effect, that the rule authorizing summary judgment was designed to foreclose plaintiffs' privilege of examining the defendants at a trial, especially as to matters peculiarly within the defendants' knowledge. It appears that there is a conflict of authority on the question of whether the Federal Rule authorizing summary judgment permits a trial by affidavits if either party objects.

Even if "there is the slightest doubt about the facts" the plaintiff is entitled to a trial.

> *Doehler Metal Furniture Co.* v. *United States,* 149 F. (2d) 130, 135 (C. C. A. 2nd);

Sartor v. *Arkansas Natural Gas Corp.*, 321 U. S. 620;
Arenas v. *United States*, 322 U. S. 419, 434;
Toebelman v. *Missouri and Kansas Pipe Line Co.*, 130 F. (2d) 1016, 1018 (C. C. A. 3rd);
Associated Press v. *United States*, 326 U. S. 1, 6-7.

That such doubt exists in the case at bar is amply supported in view of the gravamen of the complaint.

(a) That the defendant directors did not act in good faith and employ such diligence, sagacity, vigilance and prudence as in general prudent men of discretion and intelligence in like matters employ in their own affairs.

(b) That the defendant directors were guilty of gross negligence and breach of trust in failing to seek restitution from the estates of the former directors.

The power of the defendant directors to compromise a lawsuit is subject to the same limitations as are all other powers of directors. They may not settle *negligently*, nor in *bad faith*, nor for the *benefit of third parties*, but their settlement must be a bona fide act done for the benefit of the Railroad. *Hill* v. *Wallace*, 259 U. S. 44 (1922).

The situation here is similar to that in *Independent Order of Foresters* v. *Scott*, 223 Iowa 105 (1937). There, as here, the defendants contended that where directors settled or compromised a dispute in which the corporation was involved, the minority stockholders could not ask for judicial review. But the Court emphatically rejected this contention, pointing out that there are limits to the powers of directors to settle a lawsuit and that these powers are always subject to review by the Courts. The Court said (p. 116):

> "Assuming that the compromise settlement did involve a question of internal policy and management, it would be subject to review by the courts under petitioner's admitted exceptions to the rule."

Each of the issues—negligence and bad faith—is an issue of fact. If there is a trial, the conclusions on those issues of the trier of the facts would bind this Court on appeal, provided the evidence supports those findings, regardless of whether this Court would have reached the same conclusions.

It was urged by the plaintiffs in the lower Court that the defendants were guilty of breach of trust of their fiduciary duties in that the Perrine suit did not constitute a dangerous threat to the Pennsylvania Railroad and was not in fact taken seriously in the past by the Pennsylvania; that the directors had no right to waive certain legal rights of the Pennsylvania and that the Pennsylvania having won after many years of long, bitter and protracted litigation the Overfield and Weigle suits, acted improperly and wrongfully in failing to obtain a ruling on the petition for rehearing by this Court of its decision in the Overfield and Weigle suits; that all of the directors with the exception of Robert T. McCracken were not adequately informed as to the facts regarding the litigation of the proposed settlement of it; that in approving the agreement of settlement, the directors were principally motivated by the possibility of effecting a large tax saving to the railroad company through the deductibility of the amount paid, as a business expense; that the inclusion in the agreement of settlement of a provision releasing the estates of the deceased directors of Pennroad from Pennroad's claims of liability and the purchase of the releases with funds belonging to Pennsylvania was contrary to the interests of the Pennsylvania; that the agreement of settlement in providing that it shall be subject to the approval of the Delaware Court of Chancery and failing to provide for the approval of the Federal Court for the Eastern District of Pennsylvania, is in violation of Rule 23(c) of the Federal Rules of Civil Procedure.

Summary judgment was then improper if the defendant directors did not act in good faith or acted negligently. On these issues, the District Judge, who heard no oral tes-

timony, had before him the depositions of the defendants and other persons who were in one way or another involved in or concerned with the settlement agreement and negotiations leading up to it and the affidavit of Archibald Palmer, counsel for the plaintiffs.

The Judge obviously accepted the statements of the defendant directors contained in the affidavits submitted by them that they acted honestly and in good faith for their corporation.

If after hearing all the evidence, the Court disbelieved defendants' denials that they acted in bad faith, or acted negligently, he could from such facts enjoin the payment of the $15,000,000. It follows that, as credibility is unavoidably involved, genuine issues of material facts exist. Plaintiffs have been deprived of the privilege of cross-examining the defendants. Counsel for the plaintiffs may at such examination elicit damaging admissions from the defendants and plaintiffs may persuade the trier of the facts, observing the manner of the defendants when testifying, that the defendants made the settlement in bad faith and performed their duties in a negligent manner.

> Mr. Justice Douglas, *Directors Who Do Not Direct,* 47 Harv. L. Review 1305, 1325, 1326.

Of course, plaintiffs examined defendants on deposition, but the right to use depositions for discovery, or for limited purposes at a trial, does not mean that they are to supplant the right to call and examine the adverse parties, if they are available, before the Court; for the demeanor of witnesses is recognized as a highly useful method of ascertaining the truth.

In *Napier* v. *Bossard,* 102 F. (2d) 467, 468-469 (C. C. A. 2nd), the Court said:

> "A deposition has always been, and still is, treated as a substitute, a second best, not to be used when the original is at hand."

It has often been said that the oral testimony of a witness, in the presence of the Court and jury, is much better than his deposition can be.

In *Untermeyer* v. *Freund,* 37 F. 342, 343, Coxe, J., noted that:

> "A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression."

In *Pinson* v. *Atchison, T. & S. F. R. Co.,* 54 F. 464, 465, the Court said:

> "It is sometimes difficult and impossible to get so full, explicit and perspicuous a statement of facts from the witness through a deposition as it is by examination before court and jury."

See also:

> *Moore, Facts* (1898), Secs. 963, 967, 991-995.

Where, as here, credibility is crucial, summary judgment becomes improper and a trial indispensable.

The following excerpt from the minutes of the meeting on February 14, 1945, is significant for the reason that it is evident that the Overfield and Weigle suits were being settled and not the Perrine suit (Willcox Deposition, pp. 298-300):

> "* * * As a result of these various conferences Senator Daniel O. Hastings, one of the counsel for the plaintiffs, submitted the figure of $16,578,000.00 in final settlement and satisfaction of all claims which the Pennroad Corporation or its stockholders might have against this company or any of its directors and the discontinuance of all proceedings based thereon, *including the Perrine suit in Delaware.* * * *" (Italics ours.)

The following excerpt of the minutes of the meeting of February 28, 1945, at which the settlement agreement was

formally approved, is also highly significant (Willcox Deposition, pp. 319-324):

> "By the terms of this draft agreement a payment of $15,000,000.00 by this company would be made *in full settlement of all present litigation* and the settlement would be made subject to the approval of the Chancery Court of Delaware."

In the first instance, corporate minutes are evidence of the matters therein recited. They are competent prima facie evidence, presumed to be complete, and the best evidence of the transactions at a directors' meeting.

Fletcher states the rule with respect to corporate records thus (5 Fletcher Cyc. Corp. [Perm. Ed.], Sec. 2196):

> "It is not to be questioned that, generally speaking, books and records kept by a corporation in the regular course of its business are admissible in evidence to the same extent and under the same conditions as other private books and records. And it is the general rule that such original books and records, if they are in existence and can be produced, are prima facie evidence of the matters recorded therein. * * *
>
> * * * the original books and records of a private corporation, when properly authenticated, are the best evidence of its acts, resolutions and proceedings, * * *."

And Thompson adds (3 Thompson on Corporations [Third Ed.], Sec. 1962):

> "The minute book is evidence both that its contents are correct and that presumptively, proceedings not recited therein did not actually occur. * * *."

In *Gentry-Futch Co.* v. *Gentry,* 90 Fla. 595 (1925), the minutes of a stockholders' meeting were introduced in evidence for the purpose of showing, among other things, that certain stockholders were present by proxy, the minutes containing an entry to this effect. Holding that the minutes were properly admitted, Brown, J., said (pp. 609-610):

> "Ordinarily, the minutes of corporate meetings are prima facie evidence, and usually held to be the best evidence of what they purport to show as to the corporate business transacted at such meetings."

All of the recitals in the minutes are material evidence. As Miller, J., said in *Friend* v. *Hamill,* 34 Md. 298, 308 (1870):

> "Where the question is, whether a party has acted prudently, wisely, or in good faith, the information (sic) on which he acted, whether true or false, is original and material evidence and not mere hearsay" (Cf. 3 Wigmore on Evidence [2nd Ed.], Sec. 1789; also Sec. 1732 [3]).

The reason for this rule is plain. The real plaintiff in this action is the Railroad, and the nominal plaintiffs' rights are wholly derivative. The minutes are corporate records of the Railroad, kept by the officers in the course of their official duties. They are not records belonging to the individual directors. They are, therefore, records of the real plaintiff, kept by its officers as part of their official duties. To make false entries in them would constitute forgery. If the minutes tend to substantiate an action against the directors, they might be offered in evidence against them. "Wherever there is a duty to record official doings, the record thus kept is admissible" (3 Wigmore on Evidence [2nd Ed.], Sec. 1639).

Whether they are used by or against the directors, there can be no question that the minutes are the official records of the real plaintiff in this action and are prima facie evidence of the matters recorded therein, and the best evidence of the directors' proceedings.

In the instant case, it will not do to say that the plaintiffs have offered nothing which discredits the honesty of the defendants in approving the settlement agreement, and hence, the latter's deposition must be accepted as true. Rule 56 was not designed to foreclose plaintiffs' privilege

of examining defendants at a trial, especially as to matters peculiarly within their knowledge. We do not believe that, in a case in which the decision must turn on the reliability of witnesses, the Supreme Court, by authorizing summary judgments, intended to permit "a trial by affidavit" if either party objects. *Grave injustice might easily result.* In equity practice in the Federal Courts before 1912, extensive use had been made of deposition testimony. But Rules 46 and 47 of the Equity Rules of 1912 expressly provided that in "all trials in equity the testimony of witnesses shall be taken orally in open court", unless there was a "good and exceptional cause for departing from the general rule".

Lane, The Federal Equity Rules, 46 Harv. L. Rev. (1933) 638, 651.

The aim of present Rule 56 was not to restore in equity the old practices abolished in 1912. That such was not the purpose appears from Rule 43(a) which provides that "the testimony of witnesses shall be taken orally in open court", except in unusual circumstances.

Moore, Federal Practice (1938), 3064, 3066, 3189.

To illustrate the injustice done to the plaintiffs in awarding summary judgment to the defendants and depriving the plaintiffs of a trial, we direct the attention of the Court to the statements made by several of the defendant directors at their examination before trial which are at variance with the statements contained in the minutes of the corporation hereinabove referred to.

When Mr. Clement, president of Pennsylvania, was examined before trial he testified that the decision of the Circuit Court of Appeals reversing Judge Welsh was a great source of satisfaction to him (p. 8); that he was well aware of the fact that Pennsylvania did not owe any money to Pennroad; that in the month of January, 1945, Mr. McCracken informed him that he had been approached by Mr. Thompson on the subject of settling the situation

(p. 10); that he was seriously concerned about the Perrine suit where there was no statute of limitations, and "that is the case that is settled here" (p. 13); that he was not aware of the fact that Mr. Southerland, who represented Pennsylvania in the Perrine suit, had made a statement to the Chancellor in the course of the hearing on the petition of Pennroad for the approval of the settlement agreement; that Pennsylvania did not owe any money to Pennroad (p. 15); that the reason for settling the Perrine suit was that Pennsylvania was "in good cash position, in good earning position", and that he considered that the settlement of the case would be in the best interest of Pennsylvania (p. 21) (when counsel for the plaintiffs read the judgment of the Circuit Court of Appeals to him); he said "that has to do with this suit down here and we are settling the suit in Wilmington" (p. 28); that he considered every one of the suits a strike action (p. 30); that he was advised by Mr. McCracken and Mr. Dickinson to consider settlement of the Perrine suit; that Mr. McCracken and Mr. Dickinson explained the situation to the directors at a meeting of the board; that he recommended to the board that if the suit could be settled within the limits recommended by counsel, counsel should be empowered to continue to discuss settlement; that Mr. Dickinson and Mr. McCracken had agreed "that we were settling the case in Delaware" (p. 56); "I am telling you that this was the settlement of the suit in Delaware, that is the suit we are settling" (p. 57); that he knew Pennroad stockholders were taking a cross-appeal; that if the settlement were made this year, and it was a deductible item of expense, then in view of the fact that Pennsylvania was in the excess profits tax class, the cost to Pennsylvania would be around 15% (p. 69); (when he was asked about restitution from the former directors); he knew nothing about that (p. 94); that he had obtained opinions from tax counsel in Mr. Dickinson's office, as well as tax counsel in the office of Mr. McCracken (p. 105); that "the case was never to be settled in the Federal Court

from the very inception, and the question of this suit in Wilmington was the one that brought it up" (p. 105); that if the settlement took place in Wilmington, it would constitute a current expense (pp. 107, 110); that in searching for the reasons for settlement of the Perrine suit in Delaware, the attention of the Court is directed to the testimony given by Hastings before Vice-Chancellor Pearson, which appears in the record (pp. 111, 112); that the reasons given by Mr. Wolf, counsel for Pennroad, for the settlement of the Perrine suit also appears in the record (pp. 114, 117); that the main reason for the settlement was the deduction of the settlement payment as a business expense, for Federal Income Tax purposes and thereby effect a large tax saving (p. 140).

Mr. McCracken testified that he was a director of Pennsylvania and played a leading part in the transaction, by reason of his acting as counsel for Pennsylvania; that he had also appeared as counsel for Pennroad in the Overfield case and had invoked the venue statute (p. 156); and that the Court of Appeals held that the Delaware Court was without the means of affording a convenient, efficient and just determination of the case with respect to essential parties charged with wrongdoing (p. 156); that on the 12th day of January, 1945, he met Mr. Thompson who asked him if he would consider settling the Perrine case in Delaware, to which he replied in the affirmative, and authorized Thompson to take up the matter of settlement with Mr. Pepper (pp. 223, 227); that he told Hastings that he was not settling the case in Pennsylvania (pp. 228, 903); that he told Hastings that he had investigated the tax situation and that the expenditure of $15,000,000 would be much more likely to be allowed by the taxing authorities if the case was settled in Delaware; that the Perrine suit was a strike suit (p. 242); that he was authorized by Clement to offer $7,500,000; that he thought the case was worth $15,000,000 (p. 244); that he made a fair offer of $12,000,000 (p. 245); that he was not awfully proud of the settlement

(p. 252); that the Perrine suit was brought baselessly. Pennsylvania owed nothing to Pennroad (p. 263); *that he was settling the Perrine suit* (p. 331); that he appeared before the directors; that "we never considered settling in any other way except in Delaware" (p. 352); that there was a case pending there (pp. 354, 356, 358); "And we were from the beginning settling the suit in Delaware" (p. 358); that all of the allegations in the Perrine suit were false (pp. 847-885, inc.); that he investigated the possibility of deducting the settlement payment as a business expense, for Federal Income Tax purposes in the month of January, 1945 (p. 909); that he was settling the Perrine case (pp. 911, 912, 913).

Mr. Deasy, vice-president and director of Pennsylvania, testified:

> "Q. So that at that time the discussion was to settle all three cases? A. That is correct."

Walter S. Franklin, director and vice-president, testified that he knew that if the payment could be deducted as an expense, the cost to Pennsylvania would be about 15% (p. 629); that if the settlement were made in Delaware, the sum of $15,000,000 was going to cover the Overfield, Weigle and Perrine cases (pp. 630, 631, 632).

Richard D. Wood, a commission merchant in cotton goods and an operator of cotton mills, testified that he was a director of Pennsylvania and that he voted in settlement of the Perrine suit (p. 829); that he relied upon counsel.

Mr. C. Jared Ingersoll, in his affidavit, as well as in his deposition, testified that he finally voted in favor of settlement of the Perrine suit for the sum of $15,000,000 because there was no way of knowing what the outcome of the Perrine suit might be.

Mr. Wolf, counsel for Pennroad, testified at page 1551:

> "Q. That agreement referred to the settlement of three suits, two in Pennsylvania and one in Delaware? A. Yes.

> Q. When for the first time did you ever learn from either Mr. Dickinson or Mr. McCracken that they wanted this settlement to take place in the Perrine suit—when for the first time? A. When Senator Hastings and I saw Mr. McCracken and Mr. Dickinson after the Board of Pennroad had authorized the settlement which was on February 15th, 1945. We saw Mr. McCracken and Mr. Dickinson a day or a couple of days after that and then—I am not certain of the day. Anyway, it was after that meeting that we saw them to discuss the settlement and they then told us that they wished a settlement made in the form of a settlement of the Perrine suit" (p. 1553).

At the trial, plaintiffs may establish that the inclusion in the agreement of settlement of a provision releasing the estates of the deceased directors of Pennroad from Pennroad's claim of liability was contrary to the best interests of the Railroad Company. The plaintiffs may show that the defendant directors were not adequately informed and did not adequately consider and discuss all the facts and considerations which were essential to the determination of the question whether or not the settlement agreement should be approved.

The plaintiffs may call witnesses to show the real reasons which led the defendant directors to approve the settlement and the facts which actually guided them in reaching their conclusion.

It should be remembered that there are differences among the statements not only as to slight and unimportant details but differences as to whether or not the Overfield and Weigle suits which had been won were being settled or whether the Perrine suit which had been in an inactive state in the Chancery Court of Delaware for years was the case which was settled.

The avowed purpose of those who sponsored the summary judgment practice was to eliminate needless trials where by affidavits it could be shown beyond possible question that the facts were not actually in dispute.

II

This case presents questions of great importance to public stockholders in large companies whose policies are directed by a few holding blocs of stock and acting in concert, thereby enabling the few to elect the directors of the corporation.

One such question is whether a corporation has an indisputable right to indemnity and restitution from former directors for moneys expended in discharging liabilities brought about by such directors through their acts of misconduct, or gross negligence, or bad faith.

It is a fundamental principle of our jurisprudence that one that has been held legally liable for the wrongful act of another "is entitled to indemnity from the latter". (*Oceanic S. N. Co.* v. *Compania T. E.*, 134 N. Y. 461, 467.) The doctrine is one of ancient origin "ever since Justinian said: 'The maxims of law are these: To live honestly, to hurt no man and to give every man his due', it has been a leading object of jurisprudence to compel wrongdoers to make reparation". (*City Trust etc. Co.* v. *A. N. Brewing Co.*, 174 N. Y. 486, 488.) It is not necessary that a defendant from whom an indemnity is sought owe the plaintiff any special or particular duty to refrain from the commission of the act which caused the liability. "The right to indemnity rests upon the principle that everyone is responsible for the consequences of his own wrong and if another person has been compelled to pay the damages which the wrongdoer should have paid, the latter becomes liable to the former." (*Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 217; *Phoenix Bridge Co.* v. *Creem*, 102 A. D. 31, aff'd 185 N. Y. 680.)

The rule is one of universal application. It is not limited to the recovery of the damages suffered by one for the tort of another. The liability, for which indemnification will be enforced, may have resulted from the commission of

a tort, the breach of a contract, the violation of a statute, the avoidance of a fiduciary obligation, or the omission of any other duty imposed by the law.*

"The right to indemnity will be enforced in all cases where the liability is derivative or secondary." (*Fedden* v. *Brooklyn Eastern District Terminal,* 204 A. D. 741.)

It is a commonplace that a corporation is "inanimate and incapable of thought, action or neglect". "It can neither act nor omit to act", except through its directors or officers. It follows that the corporation's right to indemnity from its former directors was and is absolute. (*Iroquois Gas Corp.* v. *International Ry. Co.,* 240 A. D. 432, 433.) The former directors of the Pennroad Corporation who were directors of Pennsylvania occupied a relationship towards Pennsylvania, which, at the least, involves the obligations existing between a principal and his agent, or a master and his servant. (*Hun* v. *Carey,* 82 N. Y. 65, 79.)

The decision in *Fedden* v. *Brooklyn Eastern District Terminal,* 204 A. D. 741, one of the leading authorities in this country, squarely sustains the corporation's absolute right to indemnification and reimbursement from its former directors.

The Federal Rule is in accord:

Kramer v. *Morgan,* 85 F. (2d) 96;
Ohio Valley Bank v. *Greenbaum Sons Bank & Trust Co.,* 11 F. (2d) 87, 91.

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* Tort: *Village of Port Jervis* v. *First National Bank,* 96 N. Y. 550; *Prescott* v. *LeConte,* 83 A. D. 482, aff'd 178 N. Y. 583; *New York Central Ry. Co.* v. *Barnet,* 192 A. D. 784.

Breach of Contract: *Lamb* v. *Norcross Bros. Co.,* 208 N. Y. 427; *Pinney* v. *Geraghty,* 209 A. D. 630; *May* v. *Poluhoff,* 65 Misc. 546.

Statutory Violation: *Liberty Mutual Insurance Co.* v. *Colon & Co.,* 260 N. Y. 305.

Fiduciary Duties: *Castle* v. *Noyes,* 14 N. Y. 332; *Kelly* v. *42nd Street Ry. Co.,* 37 A. D. 500.

Obligations Implied by Law: *Carleton* v. *Lombard Ayres & Co.,* 149 N. Y. 137.

The rule in England is the same:

Studdert v. *Grosvenor* (1886), 33 Ch. Civ. 528.

See also:

Lord & Taylor v. *Yale & Towne Mfg. Co.*, 230 N. Y. 132, 138;
Murphy v. *City of Yonkers*, 213 N. Y. 124, 129.

If an indemnitor fails or refuses to assume the defense of an action when called upon to do so, by the party to whom he is ultimately responsible, "the judgment will bind him to the same way and to the same extent as if he had been made a party to the record". (*Oceanic S. Co.* v. *Compania T. E.*, 144 N. Y. 663, 665.) When the indemnitor is called upon to defend, he possesses a right to appear and control the action and to appeal from the judgment. He is entitled to take any other steps in the action which the nominal defendant could pursue. (*Matter of Culver Contracting Corp.* v. *Humphrey*, 268 N. Y. 26, 41-42.)

"The right to indemnity becomes absolute, with the recovery of a judgment in a court of original jurisdiction. * * *" (*Murphy* v. *City of Yonkers*, 213 N. Y. 124, 127.) That judgment is binding and conclusive upon the indemnitor, even though it be settled without an appeal for less than the amount of the judgment. (*Phoenix Bridge Co.* v. *Creem*, 102 A. D. 354; *Kelly* v. *42nd Street Ry. Co.*, 37 A. D. 500.) In fact, the right to indemnity will be enforced even if the claim be settled before the entry of a judgment by any court. The damage "may be voluntarily paid by the innocent party who is legally liable without waiting for judgment". (*Dunn* v. *Uvalde Asphalt Co.*, 175 N. Y. 214, 218.) In that event the innocent party is required to establish, in seeking the indemnity, the reasonableness of the settlement. In the instant case, the respondents have repeatedly emphasized the reasonablness of Pennsylvania's payment to Pennroad. The liability of the estates of the former directors follows, therefore, as a matter of law.

The liability of the former directors to Pennsylvania is as clear and as unquestionable as though the corporation possessed their promissory notes for that amount. The District Court judgment against Pennsylvania in a sum in excess of $22,000,000 evidenced the liability of the former directors. The present directors were obligated to enforce that liability if the judgment had not been reversed. The corporation herein, through the plaintiffs, charges that the directors violated their duty in failing to enforce its rights. Any proof which establishes the existence of those rights is obviously competent. Consequently, the record of that trial "even though not part of the judgment roll must be considered in determining the scope and effect of the judgment". (*Foster* v. *White & Sons,* 244 A. D. 368, 369, aff'd 270 N. Y. 572.)

That a board of directors may not refuse to compel restitution by one of its own members, or a former director, for the damages inflicted upon the corporation by their fraudulent conduct, has been an unchallenged precept of corporate jurisprudence for generations. The conduct which it demands lies beyond the bounds of any discretion permitted to corporate directors. Claims of discretion, policy, expediency, or any of the thousand and one excuses which may be devised by an ingenious mind to justify a violation of its mandate will not avail. Directors *must* compel restitution by a present or former director, for the losses occasioned by his fraudulent conduct. A faithless trustee *must* account. Restitution *must* be enforced. If the directors refuse to enforce that duty, they will be equally liable to the corporation in a suit by a minority stockholder. Time and again the Courts have been "petitioned to undermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions". (*Meinhard* v. *Salmon,* 249 N. Y. 458, 464.) The standard has never been lowered by a judgment of any Court. The directors' destruction of that "corporate asset" by their refusal to enforce the claim constitutes an illegal and unauthorized misappropriation of corporate property for which they

must all respond. Their conduct in so doing may not even be ratified by a majority of the stockholders. The direct or indirect misappropriation of assets of the corporation to their own use or benefit by an officer is incapable of being authorized or ratified by a vote or any act or omission by a majority of the stockholders. (*Pollitz* v. *Wabash R. R. Co.*, 207 N. Y. 113, 127.)

In *Matter of Auditore*, 249 N. Y. 335, the Court of Appeals reaffirmed the doctrine that fiduciaries must compel restitution by a delinquent trustee. In that case, Crane, J., referred in the following language, to a director's obligation when he is confronted with a misappropriation of corporate funds.

> "The corporation could have sued or upon its failure or refusal so to do, the administrator representing the stock could have brought the action. Would he have been guilty of negligence and carelessness in failing to compel the corporation to bring the action or in bringing the action himself if he knew by so doing the money could be restored to the corporation? To put this proposition I think is to answer it."

See also:

Quintal v. *Kellner*, 264 N. Y. 32;
General Rubber Co. v. *Benedict*, 215 N. Y. 18;
Gilbert v. *Finch*, 173 N. Y. 455;
Harris v. *Pearsoll*, 116 Misc. 366.

A decision squarely in point, the facts of which are indistinguishable from those of the instant case, is *Hill* v. *Murphy*, 212 Mass. 1. There the directors of a corporation published a libel concerning one Hill, in connection with his acts as an officer of the corporation. Hill sued the corporation and obtained a judgment for a substantial amount. The corporation paid that judgment out of its treasury. Hill, as a stockholder of the corporation, then demanded that the guilty directors reimburse the corporation for

the amount so paid. That they refused to do. He thereupon commenced a minority stockholder's action to compel them to do so. In sustaining the sufficiency of the complaint, the Court said, page 2:

> "The liability of the directors is not limited to cases where the loss to the corporation results from fraudulent misconduct on their part or where they have received financial profit which in equity belongs to the company (citing cases) and the familiar decisions of non-liability of directors acting honestly and within their power for losses sustained by the corporation through their negligence, do not apply."

In *Eshleman* v. *Keenan,* 187 Atl. 25 (Delaware Chancery, 1936), a minority stockholder suing on behalf of the Sanitary Company of America claimed that two directors had been paid twice for identical services. *The board of directors refused to sue those directors Keenan and Brewer to recover those monies.* On those facts the Court allowed a recovery for the plaintiff and said:

> " * * * The bill charges a fraud and the evidence sustains it. Now, where that is the case, it is not in the power of a majority of the stockholders to deprive the minority of their right to insist upon a rectification. This case is quite clearly distinguishable from Karasick v. Pacific Eastern Corp., 180 A. D. 604, 605, tried by this Court last August. In that case the question was one of the compromise of a disputed claim and whether the sum that was offered in settlement was reasonable, in view of the likelihood first of the recovery of judgment and, second, of the amount ultimately collectible thereon if the judgment were obtained. The proposed supplemental answer presents no authorization by the stockholders of a compromise as in the Karasick case. As it is aptly put by the solicitor for the complainants, it presents a surrender. The majority proposes to give away what, as will hereinafter appear, is a perfectly good asset, in the form of a claim belonging to the corporation without a single thing by way of compensation in return.

> Can that be done? I can find no authority justifying it. There is a wide field in which the discretion of stockholders is allowed free exercise. * * * But this field of discretion does not extend so far as to permit the majority against the dissent of the minority to grant full pardon and absolution to those who have perpetrated a fraud upon the corporation.
>
> Obviously, whether the Board of Directors refuses to compel the delinquent fiduciaries restitution by its decision not to sue, or by its execution of a release, the consequence is exactly the same. In each instance, the Courts have unanimously ruled that the directors' conduct is illegal and will be nullified in a suit by a stockholder.
>
> The directors of a corporation are all liable for any diversion of corporate funds where they assent to the fiduciaries' derelection and purport to authorize it. 'All the defendants are responsible' * * * for it was part of the fraudulent confederation into which they all entered." (*Bosworth* v. *Allen,* 168 N. Y. 157, 168.)
>
> "A director would be bound to restore what he had taken or permitted others to take." (*General Rubber Co.* v. *Benedict,* 215 N. Y. 18, 25.)
>
> "One who cooperates with a fiduciary in his breach of duty becomes liable in every way as the fiduciary with whom he cooperates." (*Lonsdale* v. *Speyer,* 248 A. D. 133, 141.)

In *Malmud* v. *Blockman,* 251 A. D. 192 (2nd Dept.), the Court said, page 194, in discussion of the nature of the action in that case:

> "Its purpose is to compel restitution of the loss sustained by the illegal conduct of the trustee and the borrowers, whereby the trust estate has been spoiled. Everyone actively concerned in such a transaction must answer for the loss to the trust estate." (*Irving Trust Co.* v. *Deutsch,* 73 Fed. (2d) 121; certiorari denied, 204 U. S. 709.)

III

The decision of the Court below presents an important question of appellate procedure.

The decision of the Circuit Court of Appeals in the case of Overfield-Weigle v. Pennsylvania Railroad Company reversed the judgment of the District Court and directed the District Court to enter a judgment dismissing the complaint. The Circuit Court of Appeals granted extension to the plaintiff to petition the Court for a reargument over a period of seventeen months. Such extensions, as a matter of law, were unreasonable as going beyond the term of the Court. Had these extensions not been granted by the Circuit Court of Appeals the parties would have been unable to enter into the agreement of settlement because there would have been no consideration for the payment of $15,000,000 by the Pennsylvania Railroad Company to the Pennroad Corporation—the consideration being the consent of the Pennroad Corporation to permit the mandate of the Circuit Court of Appeals to be made the judgment of the District Court dismissing the action.

The Federal rules applicable to appellate practice do not contemplate that the time be enlarged to an extent beyond the term of the Court within which to apply for a reargument. This decision of the Circuit Court of Appeals, affirming the District Court, in view of the questions involved, approves such practice and it is for the Supreme Court to say whether such practice should be permitted.

IV

The decision of the Court below presents the important question as to whether or not the acts of the parties are against public policy.

The parties had entered into an agreement whereby the Pennsylvania Railroad Company agreed to pay to the Pennroad Corporation the sum of $15,000,000 in settlement of all claims of the Pennroad as against the Pennsylvania. This settlement would release the defendants in the Overfield-Weigle actions from any claims by the Pennroad Corporation or its stockholders. The parties did not endeavor to make a settlement pursuant to the rules of the Federal Court with respect to stockholders' suits but evaded those rules and agreed to have Judge Welsh, a Federal District Judge sitting not in the capacity of a Federal Judge, guided and limited by the rules of the Federal Court, but acting in a private capacity as arbitrator, and, in such capacity as arbitrator, to determine fees to be paid to the attorneys for the plaintiffs, the losing parties, to the extent of $3,000,000.

This question has, insofar as counsel can ascertain, never been decided by the United States Supreme Court. An analogous situation, however, may be found in the Constitution of the State of New York, which prohibits a judge from sitting as an arbitrator for compensation or otherwise. This provision of the New York State Constitution and the cases decided thereunder were predicated upon the fact that it would be against public policy to permit a judge to sit as an arbitrator. So, too, to permit a Federal Judge to sit as an arbitrator in a case wherein he has the power to fix fees to an extent up to $3,000,000, without being limited or guided by rules of law, is against public policy and would tend to discredit the judiciary because it is plain, upon the face, that the parties were attempting to accomplish outside the pale of law what they could not accomplish within the rules of law.

Plainly stated, Senator Hastings and his colleagues, who represented the plaintiff in the Overfield-Weigle suit, which was dismissed by the decision of the Circuit Court of Appeals, without doing any more work, have succeeded in setting aside a fund of $3,000,000 for the payment of their counsel fees to be fixed by a Federal Judge sitting as an arbitrator, where he is not bound by any of the rules of the Federal Court.

The decision of the Circuit Court in the case at bar, affirming that of the District Court, puts the stamp of approval upon the procedure whereby a District Judge is permitted to sit as an arbitrator to fix fees for the attorneys for the losing parties to an extent not to exceed the sum of $3,000,000. This is a question which presents itself and should be reviewed by the Supreme Court of the United States and upon such review it should be determined that a Federal Judge should not be permitted to sit as an arbitrator in a proceeding outside the scope of his judicial duties.

The amount set aside for fees is so substantial and affects so large a number of stockholders, and of such general interest, that the Court of competent jurisdiction should not be deprived of its right to pass upon the same. In the circumstances of this case such a result would be a serious reproach to the judicial machinery of the Federal Court. The method adopted to fix the fees was the appointment of an arbitrator, unguided by rules of law or the rules of federal procedure, where there is no right to review and no right of appeal. The stockholders, although they may be heard in connection with the fixing of fees, cannot object or protest to the amount an arbitrator chooses to fix, up to an amount of $3,000,000. The fixing of such fees, not by the stockholders, not by the Court, nor through any judicial proceeding, but by an agreement between the Pennsylvania Railroad Company and the Pennroad Corporation, should not be countenanced.

The decision of the Circuit Court of Appeals affirming the judgment of the District Court dismissing the complaint

puts a stamp of approval upon the right of these parties to deprive the stockholders of these corporations to be heard in connection with fees to the extent of $3,000,000, or to appeal from a decision fixing such fees.

Conclusion

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the order of the Court below.

Respectfully submitted,

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